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No. 95-33

In The

Supreme Court of the United States

October Term, 1995

CATHERINE TYTOR,

Petitioner,

v.

THE BOARD OF TRUSTEES OF LARAMIE COUNTY SCHOOL DISTRICT NO. 2, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the District Court err by concluding that the speech between the Petitioner and her co-worker was not a matter of public concern, or, in the alternative, that the balance of interests tipped in favor of the Respondents?

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BRIEF IN OPPOSITION

The Respondents[1] respectfully ask this Court to deny the Petition for Writ of Certiorari.

JURISDICTIONAL STATEMENT

Although the Petitioner cites the proper jurisdictional provision, the Respondent will argue that the Court lacks

[1] The caption of the Petition contains a complete list of the parties.

jurisdiction to answer the question presented in the Petition. *See* Reasons to Deny the Writ *infra* part I.

STATEMENT OF THE CASE

The material facts are accurately summarized in the opinions of the District Court and Court of Appeals. Pet. at app. A, C.[2]

REASONS TO DENY THE WRIT

I. The Petitioner lacks standing to assert the question presented in the Petition.

Litigants have standing to invoke the power of a federal court only if they allege an injury "fairly traceable to the . . . allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *see*, U.S. CONST. art. III, § 2 (cases or controversies); 28 U.S.C. § 1254(1) (1988) ("cases"). The Petitioner lacks standing, and the question presented does not invoke the Court's jurisdiction, because the Court cannot redress the Petitioner's claims by answering the question as she has posed it.

The Petitioner concedes that the restrictions did not prohibit all speech between her and her co-worker, pet. at 3, that they applied only during school hours, pet. at 3, 8, that they applied only to her, pet. at 9 n.2, and that they

[2] Throughout this brief "Pet." refers to the Petition for Writ of Certiorari, and "App." refers to an appendix to the Petition.

permitted her to communicate with her co-worker via the telephone and memoranda, pet. at 4. These concessions are consistent with the District Court's finding that the ban on speech was not "all-consuming," pet. at 15a, and with the finding by the Court of Appeals that:

> The record before us does not show any absolute bar to communication between the plaintiff and the psychologist. They were free to exchange memoranda, to communicate by telephone and to meet away from the school buildings and after hours.

Pet. at 4a.

The Petitioner does not explain how the restrictions were vague. Rather, the Petitioner provides an unambiguous description of her understanding of the details of the restrictions. Pet. at 3. While the Court of Appeals referred to the "vagueness of the policy and its purpose," pet. at 4a, the context of this phrase suggests that the court was referring to the purpose of the restrictions and not to the restrictions themselves. The Court of Appeals even quoted the District Court's description of the terms of the restrictions. Pet. at 2a-3a.

Because the restrictions were neither vague nor broad, an answer to the question presented in the Petition would not redress the Petitioner's claims. Thus, she lacks standing, and the Court lacks jurisdiction. *See also, e.g., Madsen v. Women's Health Ctr., Inc.*, 114 S.Ct. 2516, 2530 (1994) (stating that the Petitioner lacked standing to challenge injunction as it applied to non-parties); *cf. Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S.Ct. 425, 426-28 (1993) (per curiam) (dismissing writ of certiorari as improvidently granted) (applying Rule

14.1(a)[3] and concluding that the Petitioner lacked standing to seek review of the question presented).

II. The question presented in the Petition was neither pressed nor passed upon below.

In the District Court, the Petitioner did not present any argument based on a prior restraint analysis. *See* Compl.; Pl.'s Mem. Law Resist. Defs.' Mot. Summ. J. In the Court of Appeals, the Petitioner argued that the restrictions constituted a broad prior restraint, but she did not ask the court to deviate from its method of analyzing prior restraints. Appellant's Br. at 17; Reply Br. Appellants at 5, 7; Pet. Reh'g and Suggest. Reh'g En Banc at 4-6. Neither of the courts below conducted a prior restraint analysis. Pet. at app. A, C.

The Petitioner criticizes the Court of Appeals for having failed to recognize that it was applying an improper analysis. Pet. at 7-8. She cites *United States v. National Treasury Employees Union*, 63 U.S.L.W. 4133 (U.S. Feb. 22, 1995) as an example of the proper analysis. Pet. 8-9. The Petitioner's criticism is unjustified because she failed to cite *National Treasury Employees Union* to the Court of Appeals. The Order and Judgment of the Court of Appeals was filed March 1, 1995. Pet. at 1a. *National Treasury Employees Union* was decided February 22, 1995. 63 U.S.L.W. at 4133. The Petitioner failed to present *National Treasury Employees Union* to the Court of Appeals either in a notice of supplemental authority or in her petition for rehearing.

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[3] Rules of the Supreme Court of the United States (hereinafter Rule or Rules).

This Court applies a prudential rule precluding review of an issue that was not pressed or passed upon below. *See United States v. Williams*, 112 S.Ct. 1735, 1738 (1992); Rule 10.1(c). Since the Petitioner failed to raise *National Treasury Employees Union* below, this Court is without the benefit of an analysis by the Court of Appeals, and for this Court to pursue an analysis on *National Treasury Employees Union*, would be an inefficient use of the Court's time. The Petitioner failed to raise the question presented in the courts below, and the courts below did not consider it; thus, this Court should deny the Petition.

III. The decisions below do not conflict with this Court's decisions.

The Petition implies that the decisions of the courts below conflict with the decisions of this Court. (The Petition does not suggest a conflict among the decisions of the United States courts of appeals.) The discussion below identifies six areas of potential conflict and explains why no conflict exists in any of the six areas.

A. Both the District Court and the Court of Appeals correctly refrained from applying a prior restraint analysis.

This is not a prior restraint case. The restrictions on the Petitioner were narrow and specific, and they were imposed because of the negative manner in which co-workers perceived the Petitioner's interaction with the school psychologist. Pet. at 4a, 15a. In *Madsen*, the Court

declined to adopt a prior restraint analysis for an injunction, where: (1) the petitioners were permitted to express their message in several ways other than the enjoined conduct; and (2) the injunction was issued because of the petitioners' prior unlawful conduct. 114 S.Ct. at 2524 n.2.

A prior restraint analysis was inappropriate here for the same reasons as in *Madsen*: the Petitioner was permitted many alternative modes of communication with the school psychologist, and the restrictions were imposed because of prior disruptive behavior. Thus, the decisions below do not conflict with *Madsen*.

B. The decisions below are consistent with this Court's prior restraint analysis (even if such an analysis were appropriate) since the Petitioner's speech was unprotected.

The District Court concluded that the Petitioner's job-related speech to the psychologist did not rise to the level of a public concern. Pet. at 15a. The Court of Appeals correctly noted that the Petitioner had failed to produce any evidence that the School District prevented her from communicating to the public about the manner in which the School District was discharging its responsibilities. Pet. at 4a-5a.

If an employee's speech cannot be fairly characterized as a matter of public concern, based on its content, form, and context, the Court need not scrutinize further the reasons for her discharge. *Connick v. Myers*, 461 U.S. 138, 146, 147-48 (1983). This Court has applied the same threshold requirement in its prior restraint analysis. *See Arnett v. Kennedy*, 416 U.S. 134, 158-59 (1974)

(plurality opinion of Rehnquist, J.) (cited in *National Treasury Employees Union*, 63 U.S.L.W. at 4137 n.12).

Neither the School District's decision to restrict the Petitioner's contact with the school psychologist nor its decision to deny her tenure was the result of any speech by the Petitioner on a matter of public concern. The Petitioner concedes this point, and instead asks the Court to abandon the threshold requirement in cases involving "blanket" prior restraints. Pet. at 8, 12. The Court should not abandon the threshold requirement. *See infra* p. 13.

C. The District Court's alternative holding is also consistent with this Court's decisions.

Abandoning the threshold requirement of speech on a matter of public concern would be of no avail to the Petitioner, because the District Court concluded, in the alternative, that "the [Respondents] adduced substantial evidence in support of their motion that [the Petitioner's] speech and/or association impaired the discipline and effective operation of the school." Pet. at 15a.

Even if an employee can make the threshold showing, the Court must balance the employee's interest in commenting on matters of public concern against the employer's interest in promoting efficiency, *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); and, the public employer bears the burden to justify its action, *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The Court, however, has given "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern[.]" *Waters v. Churchill*, 114 S.Ct. 1878, 1887 (1994)

(plurality opinion of O'Connor, J.).[4] A plurality of the Court has adopted a reasonableness test for an employer's determination of the facts underlying speech-related employment decisions. 114 S.Ct. at 1889. The Court has also noted that when a public employee communicates privately in the workplace, "the employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415 n.4 (1979) (employee's private expression to immediate superior).

The District Court's alternative determination that the balance tipped in favor of the Respondents is entitled to considerable deference in this case for two reasons. First, the School District made a reasonable determination, before it imposed the restrictions, that the Petitioner's conduct was disruptive, and the District Court found that the School District "acted rationally." Pet. at 15a. Second, the restrictions were limited to the time, place, and manner of the Petitioner's communication with her co-worker. *See supra* part I.

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[4] In *National Treasury Employees Union*, the Court distinguished *Waters* by noting that it defers only to a government employer's predictions of disruption based on isolated incidents of past speech, 63 U.S.L.W. at 4139-40 n.21. This distinction does not change the result here, because the restrictions were imposed on the Petitioner only after isolated past incidents of disruptive speech.

As the Petitioner mentions, pet. at 11, the Court of Appeals did comment about the vagueness of the restrictions and their purpose, pet. at 4a. Nonetheless, the Court of Appeals expressly refused to analyze the case beyond the necessary threshold determination, pet. at 5a. Since the District Court's alternative holding was consistent with this Court's decisions, and since the Court of Appeals did not reject the District Court's alternative holding, abandoning the threshold requirement would not change the result in this case.

D. The decisions below do not conflict with *National Treasury Employees Union* because the facts of this case are much different.

Although she failed to do so in the Court of Appeals, *see supra* part II, the Petitioner now cites *National Treasury Employees Union*. In that case, the Court considered a statute that banned federal employees from receiving honoraria. The Court held that the government's burden to justify the honoraria ban was greater than its burden to justify isolated disciplinary actions. 63 U.S.L.W. at 4137. The Court reached this conclusion for two reasons: (1) the ban was widespread; and (2) the ban was not imposed in response to actual speech, but rather chilled speech beforehand. *Id.* Neither of these factors exists here.

As the Petitioner concedes, the restrictions here applied to one employee only, pet. at 9 n.2; whereas, the honoraria ban applied to nearly 1.7 million employees, *see* 63 U.S.L.W. at 4137 n.13. The restrictions here were imposed in response to actual disruptive speech by the Petitioner, pet. at 15a; whereas, the honoraria ban was

imposed on all federal employees, regardless of grade, because of honoraria formerly received by members of Congress and high-level executives, 63 U.S.L.W. at 4139. Since the restrictions in this case did not impose a "significant burden on expressive activity" the School District's burden would be no greater than normal. 63 U.S.L.W. at 4137. The alternative holding of the District Court therefore does not conflict with *National Treasury Employees Union*.

E. The Petitioner's speech was not a substantial factor in the School District's decision, and the School District would have denied her tenure despite her speech.

If an employee can demonstrate that her speech is protected, the employee must further show that her speech was a substantial or motivating factor in the employer's decision. *Mt. Healthy Bd. Educ. v. Doyle*, 429 U.S. 274, 286-87 (1977). The employer may rebut this showing by proving that it would have reached the same decision despite the protected conduct. *Id.* The courts below appropriately refrained from addressing *Mt. Healthy*'s causation analysis, though Respondents would prevail even if this analysis were applied.

The District Court correctly concluded that the Petitioner's supervisor "acted rationally to further the effective running of the school district." Pet. at 15a. Furthermore, the Petitioner admits that the school officials, "were not concerned about the content of her speech, but the appearance it would create." Pet. at 8. Since the School District was not concerned about the

content of the Petitioner's speech, no protected speech could have been a substantial or motivating factor in the School District's decision. And, for the same reason, the School District would have reached the same decision without regard to the content of the Petitioner's speech. Thus the decisions below do not conflict with *Mt. Healthy*.

F. The Petitioner's free association argument is impertinent.

The Petitioner cites *Shelton v. Tucker*, 364 U.S. 479 (1960) to suggest vaguely that the restrictions violated her right to free association. Pet. at 11. She made the same vague suggestion in the Court of Appeals. *See* pet. at 5a. The Court should disregard this issue because it is not raised in the question presented. *See infra* pp. 13-14. But, if this issue were properly before the Court, reliance on *Shelton* would be inappropriate.

In *Shelton* the Court considered a statute of "unlimited and indiscriminate sweep[,]" 364 U.S. at 490, that required all teachers in the state to disclose each organization to which they had belonged or contributed in the past five years, 364 U.S. at 480. The restrictions on the Petitioner were much different than the statute in *Shelton* statute for the same reasons that they were much different than the honoraria ban in *National Treasury Employees Union* honoraria ban. The restrictions here were not "unlimited and indiscriminate[,]" and they were imposed because of prior disruptive behavior. Therefore, the decisions below are consistent with *Shelton* even if the Court were to consider it.

IV. The Court should deny the writ for prudential reasons.

The Court should deny the Petition for several additional reasons. First, because of the District Court's alternative holding, the Court could resolve this issue without reaching the question presented in the Petition. If a lower court gives an alternative basis for its holding, then the alternative basis may be a proper reason to deny the writ, if it could prevent the Court from reaching the question presented. *See, e.g., Lawson v. Murray*, 63 U.S.L.W. 3845, 3847 (U.S. May 30, 1995) (opinion of Scalia, J., concurring in the denial of certiorari). Here, since the District Court correctly determined that the balance of interests tipped in favor of the Respondents, the Court could resolve this case without addressing the question presented. The Court should therefore deny the writ because of the District Court's alternative holding.

Second, the Petition fails to present "special important reasons" to grant the writ. *See* Rule 10.1. Petitions addressing public employee free speech issues are common. *See, e.g., Rahn v. Drake Ctr., Inc.*, 63 U.S.L.W. 3890 (U.S. June 19, 1995) (question presented summarized at 63 U.S.L.W. 3802); *Peloza v. Capistrano Unified Sch. Dist.*, 63 U.S.L.W. 3917 (U.S. June 29, 1995) (questions presented summarized at 63 U.S.L.W. 3713). The Petitioner cites no authority indicating that the question presented in this case is any more important than the questions presented in an ordinary public employee speech case. The Court should therefore deny the writ because the Petition presents no special or important reasons.

Third, the Court should deny the writ to allow other courts to study the issue. Even when the Court does deem a question important, it sometimes may be proper to deny the writ to permit the lower courts to study the issue. *See Lackey v. Texas*, 63 U.S.L.W. 3705 (U.S. Mar. 27, 1995) (opinion of Stevens, J., respecting the denial of certiorari). Since the Petitioner cites no decisions addressing this issue, the Court should deny the writ to allow other courts to study it.

Fourth, abandoning the threshold requirement in prior restraint cases would constitute an imprudent policy decision, because it would make nearly all public employment decisions subject to litigation. If an employer notified a disruptive employee that she was subject to restrictions because of her disruptive behavior, then the employee could claim that the restrictions constitute an invalid prior restraint. *See* pet. at i. But, if the employer refrained from restricting the disruptive behavior and later disciplined the employee, then the employee could claim that the discipline was imposed without adequate notice as required by due process. For example, in *Silano v. Sag Harbor Board of Education*, 63 U.S.L.W. 3906 (U.S. June 26, 1995), one of the questions presented asserted that the employer retaliated because of an employee's speech, without notifying the employee that the speech was prohibited. *See* 63 U.S.L.W. 3867 (summarizing questions presented). Adopting the Petitioner's reasoning would therefore unfairly and unnecessarily complicate the decisions of a governmental employer.

Finally, the Petition mentions several topics that are neither subsidiary to nor included in the question presented in the Petition, including freedom of association,

pet. at 11 ("The rights of teachers to . . . associate"), the vagueness and overbreadth doctrines, pet. at 8 ("broad, vague ban on all speech"), and equal protection, pet. at 3 ("The District did not place similar restrictions on Ferneti"). These issues are not properly before the Court and the Court should disregard them. *See Izumi Seimitsu Kogyo Kabushiki Kaisha*, 114 S.Ct. at 427 n.5 (citing Rule 14.1(a)).

CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

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